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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

OVERLAND DIRECT, INC.,

Plaintiff and Appellant,

v.

LOA INVESTMENTS, LLC, et
al.,

Defendants and
Respondents.

B286696

(Los Angeles County
Super. Ct. No. BC630343)

APPEAL from a judgment of the Superior Court of Los Angeles County, Randolph M. Hammock, Judge. Affirmed.

Blanchard, Krasner & French, Kipp Williams, John F. Whittemore and Elizabeth J. Bassett for Plaintiff and Appellant.

Law Offices of Bennett A. Rheingold and Bennett A. Rheingold for Defendants and Respondents.

LOA Investments, LLC (LOA) agreed to loan money to Overland Direct, Inc. (Overland). A deed of trust on real property secured the loan. However, LOA never loaned the money but recorded the deed of trust and assigned it to Horizon Bancorp (Horizon), which foreclosed on it. Notwithstanding that these events occurred in 2009 through 2011, Overland did not file its complaint to, among other things, quiet title to the property until 2016. The trial court therefore granted LOA and Horizon's motion for judgment on the pleadings on the ground the causes of action were time-barred. Overland appeals, contending that the court should have granted it leave to amend. We disagree and affirm the judgment.

BACKGROUND

I. The loan agreement between Overland and LOA

Doron Ezra was the president and sole shareholder of Overland, a private commercial lender that was capitalized in 2007 by a \$25 million loan from Aurora Fidelity Trust Company (Aurora). Overland used that money to make secured loans on commercial real property. One of the properties Overland owned was a gas station on West 54th Street in Los Angeles (the property).

In 2009, Ezra was trying to raise cash to resolve Overland's debt repayment issues with Aurora. To that end, LOA agreed to loan \$750,000 to Overland, secured by a deed of trust on the property. Ezra signed the deed of trust on Overland's behalf on August 31, 2009. Although LOA never loaned the money to Overland, LOA recorded the deed of trust on September 22, 2009. LOA assigned the deed of trust to Horizon on December 30, 2009. Horizon foreclosed on the deed of trust on March 7, 2011.

Hossein Ghassemi bought the property in February 2014 and then sold it to Crenshaw Oil, LLC in 2016.

Meanwhile, in 2011, Ezra filed for personal bankruptcy. In November 2013, Michael Cartwright bought Overland out of bankruptcy.

II. Overland sues LOA and Horizon¹

More than five years after Horizon foreclosed on the deed of trust in 2011, Overland filed its complaint on August 11, 2016.² Based on its claim of ownership of the property, Overland alleged causes of action to quiet title, declaratory relief, conversion, violation of Business and Professions Code section 17200, and fraud against LOA and Horizon. Overland alleged that LOA was supposed to loan \$750,000 to Overland within one year (by August 31, 2010) and to hold the deed of trust *unrecorded* until the loan was made. But, once LOA got the deed of trust, it did not lend the money, and it recorded the deed of trust in September 2009.

In November 2013, Cartwright, who was Overland's new owner, discovered that LOA had committed fraud by never loaning the money despite recording the deed of trust.

LOA and Horizon asserted statutes of limitations as an affirmative defense in their answer.

¹ Overland also sued Ghassemi and Crenshaw Oil. The court sustained Ghassemi's demurrer to the complaint without leave to amend. The court granted Crenshaw Oil's motion for judgment on the pleadings without leave to amend. They are not parties to this appeal.

² Overland filed an amended complaint but the court struck it.

III. LOA and Horizon move for judgment on the pleadings

LOA and Horizon moved for judgment on the pleadings on the ground that the three-year statute of limitations governing fraud barred all causes of action (Code Civ. Proc., § 338).³ In support of the motion, they requested judicial notice of various documents, including bankruptcy filings Ezra made showing that he was aware of lawsuits referencing the LOA loan.

In opposing the motion, Overland admitted its complaint “fell short of alleging all facts necessary to establish” the delayed discovery rule. It therefore asked for leave to amend to allege additional, relevant facts. That is, Daniel Tepper and his company Esola Capital Investment, LLC pretended to be Aurora’s agents and led Ezra to believe he did not own Overland and had no authority to act with respect to the loan and deed of trust. Also, contrary to what it had alleged in its complaint, Overland now claimed that LOA recorded the deed of trust *with* Overland’s consent (a position they maintain on appeal), but LOA was supposed to reconvey the deed of trust within one year (on or by August 31, 2010) if the loan was not funded. LOA never loaned the money but failed to reconvey the deed of trust.

IV. Trial court’s ruling

The trial court granted LOA and Horizon’s motion without leave to amend on the ground the causes of action were time-barred under either the four-year statute of limitations in Civil Code section 3439.04, subdivision (a), or the three-year statute of limitations for fraud in Code of Civil Procedure section 338,

³ All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

subdivision (d). The court granted their request for judicial notice of various documents, including Ezra's bankruptcy filings.

The trial court found that the last alleged fraudulent transfer occurred in December 2009, when LOA assigned the deed of trust to Horizon. Based on that date and on the longest possible applicable limitations period of four years, the complaint had to be filed by December 2013. If the three-year limitations period in section 338, subdivision (d) applied, then Overland should have known in March 2011 that Horizon was asserting an interest in the property, because that is when Horizon foreclosed on the deed of trust and took ownership and possession of the property through a trustee's deed upon sale.

The trial court also found that Ezra had notice that LOA assigned the deed of trust to Horizon by virtue of an action filed in 2010 by Aurora against Ezra. That action alleged the assignment. Ezra knew about the Aurora lawsuit because he referred to it in bankruptcy filings.

As to its ability to amend the complaint, Overland made an oral offer of proof at the hearing.⁴ In its ruling, the trial court described the offer of proof as follows: "to wit, in late 2016, a discovery for the first time that the stock of [Overland] had not been foreclosed upon by Aurora . . . and as such, Ezra still 'owned' [Overland][]—This offer of proof is insufficient to justify leave to amend to allow [Overland] to plead 'delayed discovery.'"

⁴ The hearing was unreported, and Overland has not submitted a settled or agreed statement. (Cal. Rules of Court, rules 8.130, 8.134, 8.137.) The parties, however, agree that the absence of a record of the hearing does not preclude an adequate appellate review.

[Overland] had actual notice of these issues (at the very latest) in late 2010.”

DISCUSSION

I. Standard of review

Judgment on the pleadings in favor of the defendant is appropriate when the complaint fails to allege facts sufficient to state a cause of action. (§ 438, subd. (c)(3)(B)(ii).) “A motion for judgment on the pleadings is equivalent to a demurrer and is governed by the same de novo standard of review,” which requires us to deem true all properly pleaded material facts, but not contentions, deductions, or conclusions of fact or law. (*Kapsimallis v. Allstate Ins. Co.* (2002) 104 Cal.App.4th 667, 672.) Courts may consider judicially noticeable matters. (*Ibid.*) We give the factual allegations a liberal construction (*Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 515–516) and “‘the complaint a reasonable interpretation, reading it as a whole and its parts in their context’” (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126). When leave to amend is denied, we determine whether there is a reasonable probability the defect can be cured by amendment. The plaintiff has the burden to prove reasonable probability the complaint’s defect can be cured by amendment. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) “[I]f it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm.” (*Ibid.*)

II. Overland’s complaint is time-barred

Overland does not dispute that its complaint failed to state a cause of action. Instead, Overland contends it should have been granted leave to amend because it can allege facts showing it did

not know about the alleged fraud until 2013, and therefore the causes of action were timely. We disagree.

Where, as here, the primary cause of action is to quiet title, the theory of relief underlying the cause of action determines which statute of limitations applies. (*Muktarian v. Barmby* (1965) 63 Cal.2d 558, 560.) Overland’s underlying theory of relief is fraud, which has a three-year statute of limitations.⁵ (§ 338, subd. (d).) Under section 338, subdivision (d), the cause of action does not accrue until the aggrieved party discovers the facts constituting the mistake or fraud. (See *Zakaessian v. Zakaessian* (1945) 70 Cal.App.2d 721, 725.) The test is when the plaintiff discovered or had reason to discover the factual basis for the plaintiff’s fraud cause of action. (*Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1192.) “‘Under the discovery rule, the statute of limitations begins to run when the plaintiff suspects or should suspect that her injury was caused by wrongdoing, that someone has done something wrong to her.’ [Citation.] ‘A plaintiff need not be aware of the specific “facts” necessary to establish the claim; that is a process contemplated by pretrial discovery. Once the plaintiff has a suspicion of wrongdoing, and therefore an incentive to sue, she must decide whether to file suit or sit on her rights. So long as a suspicion exists, it is clear that the plaintiff must go find the facts; she cannot wait for the facts to find her.’” (*Stella v. Asset Management Consultants, Inc.* (2017) 8 Cal.App.5th 181, 192.) “Notice may be actual or constructive.” (*E-Fab, Inc. v.*

⁵ The parties agree the three-year statute of limitations in section 338, subdivision (d) applies. Overland makes no specific argument as to why any of the individual causes of action are timely.

Accountants, Inc. Services (2007) 153 Cal.App.4th 1308, 1318 (*E-Fab*).) “Actual notice is ‘express information of a fact,’ while constructive notice is that ‘which is imputed by law.’” (*Ibid.*)

Here, the face of Overland’s complaint shows it had presumed or constructive notice of the alleged fraud at least in March 2011. According to the complaint, in August 2009, LOA agreed to loan \$750,000 to Overland within one year, i.e., by August 31, 2010. Until the money was loaned, LOA was *not* supposed to record the deed of trust. LOA never loaned the money. Yet, it recorded the deed of trust in September 2009 and assigned it to Horizon in December 2009. Horizon foreclosed on the deed of trust and took ownership and possession of the property through a trustee’s deed of sale, which was recorded on March 7, 2011.

Thus, by at least March 7, 2011, Overland was on notice Horizon claimed an interest in the property. That is, a duly recorded document gives constructive notice of the document’s contents. (5 Miller & Starr, Cal. Real Estate (4th ed. 2011) § 10:67.) “The recording of an instrument gives notice to the world of the transfer but does not add to its efficacy as a complete conveyance of title.” (*Chaffee v. Sorensen* (1951) 107 Cal.App.2d 284, 289.) Overland thus had constructive notice at least by March 7, 2011, and, under the three-year limitations period should have filed its complaint on or by March 7, 2014.

In addition to constructive notice, matters judicially noticeable establish Overland had *actual* knowledge in 2010 of the alleged fraud based on two lawsuits filed that year concerning the property. The first lawsuit, filed in May 2010, was brought by Aurora against Overland and Ezra. Aurora alleged that Overland had borrowed \$750,000 from LOA secured by a deed of

trust on the property, which was recorded in September 2009 and assigned to Horizon, but Overland had failed to account for that money to Aurora. In November 2010, Aurora filed a second lawsuit against Overland, which also named LOA and Horizon as defendants. In that action, Aurora sought to cancel the deed of trust recorded against the property. Ezra knew about these two Aurora actions. As to the May 2010 action, he listed it in his statement of financial affairs, which he filed in his bankruptcy case in March 2011. As to the November 2010 complaint, Aurora attached it to a proof of claim it filed in Ezra's bankruptcy case.⁶ Ezra therefore actually knew that others claimed interests in the property adverse to Overland. As Overland's president and sole shareholder, Ezra's knowledge was imputed to Overland. Knowledge of a corporation's officer acting within the scope of his or her duties is imputed to the corporation. (*Uecker v. Zentil* (2016) 244 Cal.App.4th 789, 797–798; see *E-Fab*, *supra*, 153 Cal.App.4th at p. 1319 [notice to agent is notice to principal].) It is irrelevant that Cartwright did not take over the company until 2013 and did not find out about the loan until then. What is relevant is when Overland knew about the alleged fraud, and, as we have said, that was in 2010 to 2011, because Ezra's knowledge is imputed to Overland.

Notwithstanding that the complaint and matters judicially noticeable establish Overland's constructive and actual notice of the alleged fraud, Overland argues it can allege facts showing why it did *not* have notice. First, the May 2010 Aurora action (Overland ignores the November 2010 action) did not constitute

⁶ The trial court took judicial notice of the complaint filed in the November 2010 action and of the filings in Ezra's bankruptcy case.

notice, because LOA still had three months, until August 31, 2010, either to fund the loan or to rescind/reconvey the deed of trust. Even if we agreed with this notion that LOA's obligations had not yet been triggered, it would explain only why Overland failed to act in May 2010 when the action was filed. It does not explain why Overland failed to act after August 31, 2010, when the loan did not fund.

Second, Overland says it can overcome the defects in its complaint by alleging different facts. Where Overland had alleged that its deal with LOA required LOA *not* to record the deed of trust until the loan funded, Overland will now allege that LOA had its permission to record the deed of trust but was supposed to reconvey it if the loan did not fund. This proposed allegation contradicts the original complaint. A plaintiff, however, may not plead facts in an amended pleading that contradict facts originally pleaded. (*Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 877; see generally *Deveny v. Entropin, Inc.* (2006) 139 Cal.App.4th 408, 425–426 [rule against sham pleadings].) In any event, it is unclear how this proposed allegation would cure the statute of limitations problem. Indeed, the proposed allegation underscores that Overland knew or should have known of the alleged fraud on or around August 31, 2010, when LOA did not reconvey the deed of trust.

Third, Overland argues that Horizon's March 2011 foreclosure did not start the limitations period running because its then-president Ezra reasonably believed he did not own Overland or have authority to act on Overland's behalf at the time of the foreclosure. There were two reasons why Ezra so believed. First, at the time of the foreclosure, Overland was in negotiations with Aurora about the money Overland owed

Aurora. Ezra began working with what he believed were Aurora's authorized agents—Esola Capital Investment, LLC and Daniel Tepper—but in fact were not Aurora's agents. Second, Ezra, did not think he could act on the company's behalf because he thought that Aurora had foreclosed on Overland's stock. Overland learned only in 2016 that Aurora had not foreclosed on Overland's stock.

That Ezra was mistaken about the control he had over Overland is irrelevant to what he *knew* about the alleged fraud. Indeed, Ezra does not clearly deny having notice of either the facts giving rise to the alleged fraud or of the March 2011 foreclosure. He just denies having the ability to do anything about it. In any event, the trial court found that Ezra made an insufficient showing of how he could amend his complaint on this issue. That is, Overland made an oral offer of proof at the hearing that its president did not think he had control of the company, and that is why it did not take action sooner. In response, the trial court cited a statement of decision filed in an action brought by Cartwright Termite & Pest Control, Inc., a company owned by Cartwright, who bought Overland out of bankruptcy and is its current owner. Although the statement of decision supports the conclusion that Ezra remained in control of Overland at times relevant to this case, we need not rely on the decision to find that Ezra had notice of the alleged fraud, in light of our other conclusions.⁷

⁷ To the extent Overland now argues that the trial court improperly relied on the statement of decision and failed to take judicial notice of it, judicial notice was taken at Overland's request. Also, although the court did not expressly state it was

DISPOSITION

The judgment is affirmed. LOA Investments and Horizon Bancorp are to recover their costs on appeal.

NOT TO BE PUBLISHED.

DHANIDINA, J.

We concur:

LAVIN, Acting P. J.

EGERTON, J.

granting the request for judicial notice, the court, in citing it, impliedly did so.